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FILED
FEB 24 1902

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 119.

ANNIE ANDREWS, Plaintiff in Error,

vs.

KATE H. ANDREWS.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

BRIEF FOR THE DEFENDANT IN ERROR.

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Press of Byron S. Adams, Washington, D. C.

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Statement of Case.

This action was begun ~~February~~ October 14, 1897, by the plaintiff in error, who, claiming to be the widow of Charles S. Andrews, filed on that date in the probate court for the county of Suffolk, in the Commonwealth of Massachusetts, a petition for letters of administration on the estate of the said Charles (p. 2).

The proceedings were *ex parte* and without notice, as was

the practice in that jurisdiction, and resulted in the passing of a decree the same date, appointing the petitioner administratrix as prayed (p. 3).

From this decree the defendant in error, Kate H. Andrews, on the 5th day of November, 1897, appealed to the supreme judicial court of the Commonwealth, the same "being the supreme court of probate for said Commonwealth" (p. 3); and for objection to such decree she averred that the statement of the petitioner, Annie, that she was the widow of said Charles was not true, "as the appellant, Kate H. Andrews, at the time of the death of said Charles S. Andrews was his only lawful wife and is now his widow" (p. 4).

The petitioner, Annie, duly appeared in the supreme judicial court, by her attorneys (p. 4), and answering the claim of the appellant, Kate H., denied "that said Kate is the widow of Charles S. Andrews," and averred "that she has no right in law to prosecute this appeal and this court has no jurisdiction to entertain, hear, or determine the same" (p. 5).

Thereupon a hearing was had before a single judge, and both parties introduced testimony to sustain their respective contentions. At the close of the evidence the appellee, Annie, asked the court to rule—

(1st.) That upon all the evidence in the cause the appellant (Kate H.) has no standing in this court, and is not a person interested in the estate of Charles S. Andrews, deceased.

(2d.) That upon all the evidence in the case the appellant by her own conduct has connived at and acquiesced in the

marriage of said Charles S. Andrews and the appellee, Annie Andrews, and on account of said connivance and acquiescence in said marriage she cannot now be permitted to be heard to impeach the validity of said marriage.

(3d.) That upon all the evidence in the case the appellant (Kate H.) by her conduct has connived at and acquiesced in the marriage of the said Charles S. Andrews and the said appellee, Annie Andrews, and without objection has allowed the said marriage relations to exist and children to be born of the said marriage, and she cannot now be heard to impeach the validity of said marriage by attacking the validity of the divorce procured in the circuit court of South Dakota by the said Charles S. Andrews against her (p. 31).

The court refused so to rule, and exceptions to such refusal were duly noted (p. 31), but it is conceded by the brief of the plaintiff in error filed in this court (pp. 3 and 4) that the 2d and 3d requests above do not raise any questions reviewable under the pending writ of error.

Thereupon the court made the following findings of fact:

"Charles S. Andrews being then about twenty-one years of age and domiciled in Boston and the appellant were married there April 13, 1887, and thereafter lived in Boston as husband and wife until the latter part of April, 1890, at which time the wife, claiming to have a justifiable cause therefor, left her husband and began a suit for separate maintenance, which was finally settled in December, 1890, in the manner disclosed by the evidence, in accordance with the agreement of November 18, 1890.

"A child, the only issue of this marriage, died in January, 1889. In the summer of 1891 the husband, being then and ever since his marriage domiciled in Boston, went to South

Dakota to obtain a divorce for a cause which occurred here while the parties resided here, and which would not authorize a divorce by the laws of this Commonwealth; he remained personally in that State a period of time longer than is necessary by the laws of that State to gain a domicile there, and on November 19, 1891, filed a petition for divorce in the proper court of that State. The wife received notice, and appeared by counsel and filed an answer, denying that the libellant was then or ever had been a *bona fide* resident of South Dakota, or that she had deserted him, and setting up cruelty on his part toward her. This case was settled, so far as the parties were concerned, in accordance with the terms of the agreement of April 22, 1892, signed by the wife and consented to by the husband, and, for the purpose of carrying out her agreement, 'to consent to the granting of divorce for desertion in South Dakota,' she requested her counsel there to withdraw her appearance in that suit, which they did, and thereafterwards, namely, on May 6, 1892, a decree granting the divorce was passed, and within a day or two afterwards the said Charles, having attained the object of his sojourn in that State, returned to this Commonwealth, where he resided and was domiciled until his death, which occurred in October, 1897.

"The parties had never lived together as husband and wife in South Dakota, nor was it claimed that either one of them was ever in that State except as above stated. After the wife left her husband in 1890, she visited some time in New York, but had her home in Boston. In the fall of 1891 she leased her house in Boston for three years, and in November, 1891, went to stay with her parents in Washington, D. C., indefinitely, and since that time has remained a part of the time with her parents at Washington and a part of the time with her aunt in Newton in this State. I do not find that since her marriage her domicile has been changed, unless as a matter of law, it was changed to South Dakota when her husband went there. She has always since h[illegible] marriage intended that her home should be in this State, and considered it to be here.

"I find that the husband went to South Dakota and took up his residence there to get this divorce, and that he intended to return to this State when the business was finished. He boarded at a hotel in Sioux Falls all the time, and had no other business there than the prosecution of

this divorce suit. I find, however, that he voted there at a State election in the fall of 1891, claiming the right to do so as a *bona fide* resident under the laws of that State. His intention was to become a resident of that State for the purpose of getting his divorce, and to that end to do all that was needful to make him such a resident, and I find he became a resident if, as a matter of law, such finding is warranted in the facts above stated.

"Upon his return to this State he soon met the petitioner, and on January 11, 1893, they were married in Boston, and ever after that lived as husband and wife in Boston, and were recognized as such by all until his death. The issue of this marriage are two children still living.

"The petitioner at the time of the marriage believed that the said Charles had the right to marry. She had nothing whatever to do with the divorce, was in no way the alleged or actual cause of the disagreement between the said Charles and the appellant, and throughout has acted in the utmost good faith. She knew of the divorce, but believed it was legal, and had reason so to believe.

"The appellant knew of this second marriage soon after it occurred, and never took any steps to have it declared illegal, except that on July 23, 1897, she filed in this court a petition for separate maintenance against the said Charles, which was pending at the time of his death, and that she has appeared in this present case; and it does not appear that until after the death of the father of said Charles in June, 1897, she even claimed or believed the divorce illegal, or had any idea of making such a claim.

"I find, if the finding is warranted by the above facts, that the appellant connived at and acquiesced in the second marriage."

The foregoing (pp. 31–33) being all the findings of fact, the trial judge (Hon. John W. Hammond, J. S. J. C.) reiterated his refusal above noted to rule as requested by said appellee, Annie, and ruled as a conclusion of law from the above facts—

That "the divorce obtained in South Dakota, is by Public Statutes, c. 146, sec. 41, of no force or effect in this Common-

wealth; that the respondent (Kate H.) must be regarded as the lawful wife of the said Charles; that the second marriage (to Annie) was therefore illegal; and having so ruled" he ordered "the decree of the probate court to be reversed and the case remanded to said court" (p. 33).

To which refusal and rulings the appellee, Annie, duly excepted (p. 33), and a bill of exceptions was prepared, allowed, and filed on March 2, 1899 (pp. 5–33).

Thereupon, the matter having come on to be further heard on the bill of exceptions before a bench of five judges (Holmes, Ch. J.; Morton, Lathrop, Barker, and Hammond, JJ.), said exceptions were on the 16th day of May, 1900, overruled (p. 73), and by direction of said appellate tribunal were by its rescript so ordered to be noted of record by the clerk of the supreme judicial court for Suffolk county.

June 4, 1900, appearance of additional counsel for the appellee was entered by Jabez Fox, Esq., and on June 30, 1900, a final decree was entered in favor of Kate H. and against said Annie in the following terms:

"This case came on to be further heard, and now, on consideration thereof and in pursuance of a rescript from the supreme judicial court for the Commonwealth, as appears on record in this cause, it is ordered, adjudged, and decreed that the divorce obtained by Charles S. Andrews in South Dakota is of no force and effect in this Commonwealth, and that his subsequent marriage with Annie Andrews, appellee, was therefore illegal; that said Kate H. Andrews is his lawful widow, and said Andrews is not entitled, as his widow, to administer his estate; that the decree of the probate court appointing her to be administratrix of his estate be reversed and her petition for administration be dismissed" (p. 74).

To review this decree the writ of error was sued out from this court, the plaintiff in error, by her attorney, Mr. Fox, assigning errors as follows:

First. The court, in ordering her petition for the administration of the estate of Charles S. Andrews to be dismissed on the ground that she was not the widow of said Andrews, failed to give full faith and credit, as required by the Constitution and laws of the United States, to the judicial proceedings had in the State of South Dakota, by which the said Andrews was divorced from the defendant in error, Kate H. Andrews.

Second. Section forty-one of chapter one hundred and forty-six of the Public Statutes of Massachusetts, as applied to this case, is repugnant to the Constitution and laws of the United States, and the court upheld said statute (p. 7).

ARGUMENT.

Want of Jurisdiction.

No Federal question is presented by this record for the consideration of this court. Possibly a Federal question might have been raised in the courts of Massachusetts which would have supported the writ of error from this court, but it does not appear that the courts of that Commonwealth were called upon to consider any Federal question, nor do they appear to have disposed of one. In fact, the existence in the case of a Federal question as such does not seem to have been suspected until after the exceptions to the rulings of the trial judge had been overruled by the

court in *banc*, and no suggestion of the existence of such a question appears to have been made on the record until after the entry of the final decree, which it is now sought to have reviewed. Under such circumstances, the writ of error should be dismissed.

Loeber *vs.* Schroeder, 149 U. S., 580.
Sayward *vs.* Denny, 158 U. S., 180.
Pim *vs.* St. Louis, 165 U. S., 273.
Oxley Stave Co. *vs.* Butler Co., 166 U. S., 695.
Chapin *vs.* Fry, 179 U. S., 129.

The mere fact that the State courts "decreed that the divorce obtained by Charles S. Andrews in South Dakota is of no force and effect in this Commonwealth" does not of itself raise a Federal question necessitating the exercise of appellate powers by this court, for if it appears upon the face of the foreign decree or otherwise that the court of its origin was without jurisdiction to pronounce it, the so-called decree is in fact no decree, and consequently no constitutional question can arise thereabout.

Neither the decree of the supreme judicial court of the Commonwealth nor the Public Statutes (chap. 146, sec. 41) here complained of deny faith and credit to the decrees of divorce pronounced by the courts of South Dakota in general. On the contrary, the statute expressly declares that—

"A divorce decreed in another State or country according to the laws thereof, and by a court having jurisdiction of the cause and of both the parties, shall be valid and effectual in this Commonwealth."

No more liberal recognition of or assent to the decrees of foreign courts is or could be required by the due faith and credit clause of the Federal Constitution.

But the supreme judicial court, when confronted with the so-called decree of the South Dakota court, found as a fact that that court, under a fair and reasonable interpretation of the laws of that State, had never acquired jurisdiction over the parties to the controversy such as would enable it to render an effective decree in the premises.

As was said in Bell *vs.* Bell, 181 U. S., 175, 177—

"No valid divorce from the bond of matrimony can be decreed on constructive service by the courts of a State in which neither party is domiciled. And by the law of Pennsylvania every petitioner for a divorce must have had a *bona fide* residence within the State for one year next before the filing of the petition. * * * The recital in the proceedings in Pennsylvania of the facts necessary to show jurisdiction may be contradicted. Thompson *vs.* Whitman, 18 Wall., 457. The referee in this case has not only found generally that at the time of those proceedings the wife was a resident of the State of New York and the husband was not a *bona fide* resident of Pennsylvania, but has also found that on January 31, 1894, some ten weeks before he filed his petition in Pennsylvania, he described himself, under oath, in a petition for the probate of a will in Erie county, in the State of New York, as a resident of that county; and that no evidence was offered that he actually changed his domicil from New York to Pennsylvania. Upon this record, therefore, the court in Pennsylvania had no jurisdiction of the husband's suit for divorce, because neither party had a domicil in Pennsylvania, and the decree of divorce was entitled to no faith and credit in New York or any other State," citing—

Leith *vs.* Leith, 39 New Hampshire, 20.
People *vs.* Dowell, 25 Michigan, 247.
Sewall *vs.* Sewall, 122 Massachusetts, 156.
Litowitch *vs.* Litowitch, 19 Kansas, 451.
Van Fossen *vs.* State, 37 Ohio State, 317.
Gregory *vs.* Gregory, 78 Maine, 187.
Dunham *vs.* Dunham, 162 Illinois, 589.
Thelen *vs.* Thelen, 75 Minnesota, 433.
Magowan *vs.* Magowan, 12 Dickinson (57 N. J. Eq.), 322.

And so, also, is Streitwolf *vs.* Streitwolf, 181 U. S., 179, 182, where it was said:

"This case must follow *Bell vs. Bell.* The law of North Dakota requires a domicil in good faith of the libellant for ninety days as a prerequisite to jurisdiction of a case of divorce. The facts in evidence warranted, and indeed required, the finding that the husband had no *bona fide* domicil in the State of North Dakota, when he obtained a divorce there, and it is not pretended that the wife had an independent domicil in North Dakota or was ever in that State. The court of that State, therefore, had no jurisdiction."

The recital of the jurisdictional facts in the record of the proceedings had in the circuit court of Minnehaha county, South Dakota, having been called in question, and it appearing that neither party to the divorce proceedings there had ever been domiciled or acquired a *bona fide* residence in that State, it was entirely competent for the Massachusetts courts to refuse recognition to the Dakota decree. It having been found that the Dakota court had at no time had jurisdiction of the parties to the proceedings before it, the refusal to accord faith and credit to such proceedings does not raise a Federal question, for such proceedings are as though they had never been, and a decree purporting to afford affirmative relief rendered in the course of such proceedings is in effect and, indeed, in fact, no decree. If it be in fact no decree, then the failure to accord to it faith and credit is not forbidden by the Constitution even by implication, for "faith and credit" is not required to be extended to a mere name; it is commanded but for such "proceedings" as have substance.

There is no conflict whatever over the proposition stated by Mr. Schuler, as follows:

"The courts of one State are not bound to recognize a judgment of divorce granted by the courts of another State, if, in fact, the parties were neither of them *bona fide* residents of the latter State at the time of the divorce suit; for to give the courts of any State jurisdiction over the marriage relation, one of the parties at least must have a genuine domicile within its territory, and not a mere residence for the purpose of the divorce. If the parties have neither of them a domicile in the State, a divorce which the courts of that State assume to grant is absolutely nugatory, and may be so treated in other States."

Schuler on "Husband and Wife," § 574.

And in Sewall *vs.* Sewall, 122 Mass., 156, Mr. Justice Gray, delivering the opinion of the court, said that:

"Where a husband goes into another State, without acquiring a domicile there, for the purpose of obtaining, and does fraudulently obtain, a divorce for a cause which occurred in, but which was not a cause of divorce by the law of Massachusetts, a court of that State has no jurisdiction, and its decree granting the divorce is entitled to no faith and credit in Massachusetts as a judicial proceeding, even if the decree recites facts sufficient to give it jurisdiction."

In the case of People *vs.* Dawell, 25 Mich., 247, the defendant was indicted and convicted of bigamy. He claimed as a defense a divorce obtained by his first wife on her application in the State of Indiana. It appeared that the first wife, in fact, lived in Michigan, although claiming a residence in Indiana, and that the husband appeared by attorney in the Indiana proceeding and admitted the wife's residence to be in Indiana. The Indiana divorce was held invalid. Judge Cooley said in his opinion:

"I understand the rule to be, that to give the courts of any State jurisdiction over the marriage relations between

a husband and his wife one of the parties at least must have a domicile within that State. Some of the judicial decisions make further requirements, but no court has ever held that any less could be demanded" (p. 254).

It does not follow, because a court has the statutory power to grant divorces, that faith and credit must necessarily be accorded to its decrees, for to enable such court to render a valid decree of divorce it must also happen that at least one of the parties to the proceedings was a domiciled citizen of the State from which the court derives its powers.

Hood *vs.* State, 56 Indiana, 263; 26 Am. Rep., 21.

Sewell *vs.* Sewell, 122 Massachusetts, 156; 23 Am. Rep., 299.

Referring to the provision of the Constitution that full faith and credit shall be given to the judicial proceedings of other States, Judge Cooley pertinently remarks:

"Its whole purpose and aim was in the direction of justice, comity, and good neighborhood between the States and it would be most remarkable if it could now be employed to bolster up a proceeding where a court of one State has interfered with a matter which wholly pertains to the concerns of another State, and relates to its citizens exclusively, which it is impertinent for such court in any manner to meddle with, and which justice, as well as every principle of comity, requires such court to let alone. If the constitutional provision can be so employed, then I do not hesitate to say, that it is capable of accomplishing more evils than it had power to prevent; and that, too, in the very direction in which its good influences were anticipated. For the effect is to destroy interstate comity and good neighborhood by enabling one State to extend its laws and legal procedure into the domains of its neighbors, to subject the citizens of such neighbor to its control in their most important relations of life, and to introduce among them practices which their own laws regard in a very high degree vicious and demoralizing."

The Massachusetts courts have uniformly refused to recognize the validity of divorces granted by other States where a party has gone into another State without acquiring a domicile there for the purpose of obtaining, and does obtain, a divorce for a cause which occurred in but which was not a cause of divorce by the law of Massachusetts, on the ground that the court of that State had no jurisdiction, and its decree granting the divorce is entitled to no faith and credit in Massachusetts as a judicial proceeding, even if the decree recites facts sufficient to give it jurisdiction.

Sewall *vs.* Sewall, 122 Mass., 156.
Hanore *vs.* Turner, 14 Mass., 227.
Chase *vs.* Chase, 6 Gray, 157.
Lyon *vs.* Lyon, 2 Gray, 368.

The real matter of moment which the courts of Massachusetts were called upon to decide in this cause was of purely local concern.

It involved, as between two citizens of that Commonwealth, the disputed right under local laws to administer the estate of a deceased citizen who had died as he had lived, within the shadow of her State-house, and whose earthly possessions subject to such administration lay within her borders.

To decide the question of disputed right the State courts were called upon to ascertain and declare the marital status of certain of the State's own citizens who had gone through the marriage ceremony within the State according to its customs, had resided together therein as husband and wife, and none of whom up to the time of the death of the husband had acquired a domicile elsewhere.

The marriage of Charles S. and Kate H. took place at Boston, April 13, 1887, and they thereafter lived in Boston as husband and wife until the latter part of April, 1890, at which time the wife, claiming to have justifiable cause therefor, left her husband and began a suit for separate maintenance, which was finally settled in December, 1890, by agreement of the parties, and the petition was dismissed (p. 63).

> "In the summer of 1891 the husband being then and ever since his marriage domiciled in Boston, went to South Dakota to obtain a divorce for a cause which occurred here (Boston) while the parties resided here and which would not authorize a divorce by the laws of this Commonwealth," and thereafterwards a decree granting such divorce was passed and "within a day or two afterwards the said Charles, having attained the object of his sojourn in that State, returned to this Commonwealth, where he resided and was domiciled until his death, which occurred in October, 1897" (p. 32).
>
> "The parties had never lived together as husband and wife in South Dakota, nor was it claimed that either one of them was ever in that State except as above noted. After the wife left her husband in 1890 she visited some time in New York, but had her home in Boston. * * * I do not find that since her marriage her domicile has been changed, unless, as a matter of law, it was changed to South Dakota when her husband went there. She has always since her marriage intended that her home should be in this State, and considered it to be here.

"I find that the husband went to South Dakota and took up his residence there to get this divorce, and that he intended to return to this State when the business was finished." * * * "Upon his return to this State he soon met the petitioner (Annie), and on January 11, 1893, they were married in Boston, and ever after that lived as husband and wife in Boston, and were recognized as such by all until his death."

It is now well settled that each State has the right to regulate the *status* of its own citizens, but it has no jurisdiction to change or determine the *status* of citizens of a foreign State.

"It is obvious," said Chief Justice Ames in Ditson *vs.* Ditson, 4 Rhode Island, 87 (cited in Atherton *vs.* Atherton, 18 U.S. 183 supra), "that marriage as a domestic relation emerged from the contract which created it, gives rights and imposes duties and restrictions upon the parties to it, affecting their social and moral condition, of the measure of which every civilized State, and certainly every State of this Union, is the sole judge so far as its owns citizens or subjects are concerned, and should be so deemed by other civilized, and especially sister States; that a State cannot be deprived directly or indirectly of its sovereign power to regulate the status of its own domiciled subjects, and citizens, by the fact that the subjects and citizens of other States, as related to them, are interested in that status."

Each State, therefore, acting with respect to its own domiciled citizens and not called upon by reason of relation or interest to pass on the rights of citizens of any other State, is

the sole judge of the marital status of such citizens, and it alone has exclusive right to say upon what grounds or for what causes such status may be dissolved or modified.

Every State makes its law for and has the right to control the domestic status of those who make their home in it.

Cook *vs.* Cook, 56 Wisconsin, 195.
Hunt *vs.* Hunt, 72 N. Y., 217.

And so it would seem that the State of Massachusetts contravened no Federal right when, by section 41 of chapter 146 of its Public Statutes, it expressly declared that—

"when an inhabitant of this Commonwealth goes into another State or country to obtain a divorce for a cause which occurred here while the parties resided here, or for a cause which would not authorize a divorce by the laws of this Commonwealth, a divorce so obtained shall be of no force or effect in this Commonwealth;"

nor did the application of the provisions of such statute to the facts found in this cause raise such a Federal question as will support the writ of error from this court, for the State in enacting the law and the State courts in applying it were but dealing with the marital status of citizens or subjects of the Commonwealth of Massachusetts, as to which the Commonwealth, acting through its legislature or its courts, has the sole right of regulation and judgment. Of this right it cannot be deprived, either directly or indirectly.

In declining to be bound by a void decree of divorce of a court which had no jurisdiction of the marital status of either party to the marriage, and in adjudging the right to administer a local estate as between the contending claimants therefor, both of such claimants being its own domi-

iled citizens, the State courts but determined a purely local question, which was sufficiently broad to support the judgment here complained of, and no Federal question was necessarily involved in the result reached. It would seem that the writ of error should consequently be dismissed.

MERITS.

If it should be determined that this court has jurisdiction to review the judgment of the supreme judicial court of the Commonwealth, then upon the facts as disclosed by the record that judgment must be affirmed.

By section 2558 of the Compiled Laws of South Dakota, Civil Code, it is provided that marriage may be dissolved only—

"1. By the death of one of the parties.

"2. By the judgment of a court of competent jurisdiction decreeing a divorce of the parties."

"SECTION 2578. A divorce must not be granted unless the plaintiff has, in good faith, been a resident of the Territory (State) ninety days next preceding the commencement of the action."

It is plain that a court may have jurisdiction to try a divorce case without having power to grant a valid decree of divorce to the applicant, even though he may allege and prove a cause for divorce under the laws of the State where relief is sought; for example, if the applicant be not in fact domiciled within the territorial jurisdiction of the court.

Bishop, Marriage, Divorce, and Separation, sec. 51.

The tribunals of a country have no jurisdiction over any cause of divorce, wherever or whenever it arose, if neither

of the parties has within its territory an actual *bona fide* domicil. Nor does it make any difference that both parties are temporarily there, submitting to the jurisdiction.

Bishop, Marriage and Divorce, 6th ed., sec. 144.

Though the words "domicil" and "residence" are not synonymous, a statute requiring a specified number of years residence in a State to give the courts jurisdiction of an application for divorce is to be interpreted as requiring domicil.

Ibid., sec. 124.

Our divorce statutes giving jurisdiction commonly provide that the applicant shall have "resided" a given number of years in the State. The principles of international law and the general principles of our own requiring the residence for divorce to be *animo menendi*, such residence must at least partake of the character of permanency.

Whitcomb *vs.* Whitcomb, 46 Iowa, 437.

Hanson *vs.* Hanson, 111 Mass., 158.

"If a party goes to a jurisdiction other than that of his domicile for the purpose of procuring a divorce, and has residence there for that purpose only, such residence is not *bona fide*, and does not confer upon the courts of that State or county jurisdiction over the marriage relations, and any decree they may assume to make would be void as to the other party."

Cooley, Constitutional Limitations, p. 401.

Citing:

Hanover *vs.* Turner, 14 Mass., 227.
Greenlaw *vs.* Greenlaw, 12 N. H., 200.
Kimball *vs.* Kimball, 13 N. H., 225.
Bachelder *vs.* Bachelder, 14 N. H., 380.
Payson *vs.* Payson, 34 N. H., 518.
Hopkins *vs.* Hopkins, 35 N. H., 474.

In an action by the husband for his interest in the deceased wife's lands it appeared that the wife had gone to Nebraska temporarily to obtain a divorce. The law of Nebraska required as a condition precedent six months' residence. The wife remained within the State the requisite length of time. *Held*, that the Nebraska court had not acquired jurisdiction, and its decree of divorce in the case might be collaterally assailed.

Neff *vs.* Beauchamp, 74 Iowa, ~~985~~ 95

Residence in good faith includes the attributes of domicil.

Carpenter *vs.* Carpenter, 30 Kansas, 712.

It presupposes the intention of remaining in the place permanently.

Smith *vs.* Smith, 7 North Dakota, 412.

The application of this view to the case at bar is expressed in the opinion of the court (pp. 75, 76), as follows:

"Charles S. Andrews went to South Dakota for the purpose of getting the divorce, and intended to return to Massachusetts as soon as he had done so. Subject to this intention, it is found that he intended to become a resident of South Dakota for the purpose of getting a divorce, and to do all that was needful to make him such a resident.

"The statute of South Dakota forbids a divorce, 'unless the plaintiff has, in good faith, been a resident of the Territory ninety days next preceding the commencement of the action.' * * * the language of the South Dakota statute must be taken to require not merely bodily presence, but domicil. In the light of the decisions upon similar acts, and the generally accepted rule making domicil the foundation, the words 'resident of the Territory' mean domi-

ciled in the Territory, whether they also mean personally present or not," citing

Graham *vs.* Graham, 81 N. W. Rep., 44.
Dickinson *vs.* Dickinson, 167 Mass., 474, 475.
Reed *vs.* Reed, 52 Mich., 117, 122.
Leith *vs.* Leith, 39 New Hampshire, 20, 41.
Van Fossen *vs.* State, 37 Ohio St., 317, 319.

"The finding of the single justice clearly means that the deceased did not get a domicil in South Dakota. He meant to stay there ninety days, and such further time, perhaps, as was necessary to get his divorce, and then he meant to come back to Massachusetts."

The facts in evidence warranted, and indeed required, the finding that Charles S. Andrews did not have a *bona fide* residence or domicil in the State of South Dakota when he obtained the decree of divorce there, and also the further finding that his wife, Kate H., had never been in that State.

Upon the authority of Bell *vs.* Bell and Streitwolf *vs.* Streitwolf, *ubi supra*, it is plain that the decree of the supreme judicial court must be affirmed unless the further facts found by that court, viz., that said Kate H., having notice of the pendency of the proceedings in the South Dakota court, appeared therein by counsel, filed an answer denying that the libellant was then or ever had been a *bona fide* resident of South Dakota, and subsequently "for the purpose of carrying out her agreement, 'to consent to the granting of a divorce for desertion in South Dakota,' requested her counsel there to withdraw her appearance in that suit, which they did," and afterwards, without further objection on her part, the decree now attacked was passed, are material and necessitate a different result.

It is evident that these additional facts cannot affect the sult unless it be conceded that connivance or consent can rve to render a decree otherwise void for want of jurisdic-n in the tribunal pronouncing it valid.

However this might be in ordinary suits *in personam*, in vorce proceedings consent cannot vitalize an otherwise id decree, for the courts of a State where neither party is miciled are without jurisdiction in law to render a valid cree of divorce, and as such suits are not merely suits be-reen the husband and wife, but affect a public institution, eir consent cannot confer jurisdiction, so that where a di-orce is granted in a State where neither party is domiciled, t in a proceeding in which both have appeared, their mar-ed status is not affected.

Harrison *vs.* Harrison, 20 Alabama, 629.
McGuire *vs.* McGuire, 7 Dana (Ky.), 181.
People *vs.* Dowell, 25 Michigan, 247.
Van Fossen *vs.* State, 37 Ohio St., 317.
Whitcomb *vs.* Whitcomb, 46 Iowa, 437.
Litowitch *vs.* Litowitch, 19 Kansas, 451.
Chase *vs.* Chase, 6 Gray, 157.
Sewall *vs.* Sewall, 122 Massachusetts, 156.
Leith *vs.* Leith, 39 New Hampshire, 20.
Platt *vs.* Platt, 80 Penna. St., 501.
Hare *vs.* Hare, 10 Texas, 355.
Jackson *vs.* Jackson, 1 Johns, 424.

"Divorce is allowed only for causes approved by law. Therefore the parties cannot dissolve their own marriage, or validly agree to a suspension of the cohabitation under it. Nor, for the same reason, can the courts do either simply from their consent. So that when an attempt is made

through the tribunals to accomplish this object, the public becomes in effect a party to the proceeding, not to oppose the divorce at all events, but to prevent the sentence passing except as justified by facts which the law has declared to be sufficient; 'for society has an interest in the maintenance of marriage ties, which the collusion or negligence of the parties cannot impair;' hence a divorce suit, while on its face a mere controversy between private parties of record, is, as truly viewed, a triangular proceeding *sui generis*, wherein the public, or government, occupies in effect the position of a third party."

Bishop, Marriage and Divorce, 6th ed., secs. 229*b*, 230.

This view has already been sealed with the approval of this court, and the doctrine contended for was expounded at length in Maynard *vs.* Hill, 125 U. S., 190, 210, where, speaking through Mr. Justice Field, it was said:

"It is also to be observed that, whilst marriage is often termed by text-writers and in decisions of courts a civil contract—generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization—it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress. This view is well expressed by the supreme court of Maine in Adams *vs.* Palmer, 51 Maine, 481, 483. Said that court, speaking by Chief Justice Appleton:

"'When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of

which rest not upon their agreement, but upon the general law of the State, statutory or common, which defines and prescribes those rights, duties, and obligations. They are of law, not of contract. It was of contract that the relation should be established, but, being established, the power of the parties as to its extent or duration is at an end. Their rights under it are determined by the will of the sovereign, as evidenced by law. They can neither be modified nor changed by any agreement of parties. It is a relation for life, and the parties cannot terminate it at any shorter period by virtue of any contract they may make. The reciprocal rights arising from this relation, so long as it continues, are such as the law determines from time to time, and none other.' And again: 'It is not, then, a contract, within the meaning of the clause of the Constitution, which prohibits the impairing of the obligation of contracts. It is, rather, a social relation, like that of parent and child, the obligations of which arise not from the consent of concurring minds, but are the creation of the law itself; a relation the most important, as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life and the true basis of human progress,' pp. 484, 485. And the Chief Justice cites in support of this view the case of Maguire *vs.* Maguire, 7 Dana, 181, 183, and Ditson *vs.* Ditson, 4 R. I., 87, 101. In the first of these the supreme court of Kentucky said that marriage was more than a contract; that it was the most elementary and useful of all the social relations, was regulated and controlled by the sovereign power of the State, and could not, like mere contracts, be dissolved by the mutual consent of the contracting parties, but might be abrogated by the sovereign will whenever the public good, or justice to both parties, or either of the parties, would thereby be subserved; that being more than a contract, and depending especially upon the sovereign will, it was not embraced by the constitutional inhibition of legislative acts impairing the obligation of contracts. In the second case the supreme court of Rhode Island said that *marriage*, in the sense in which it is dealt with by a decree of divorce, is not a contract, but one of the domestic *relations*. In strictness, though formed by a contract, it signifies the *relation* of husband and wife, deriving both its rights and duties from a source higher than

any contract of which the parties are capable, and as to these uncontrollable by any contract which they can make. When formed, this relation is no more a contract than 'fatherhood' or 'sonship' is a contract."

See also Chase *vs.* Chase, 6 Gray, 157, 161, where it is said:

"Nor would such a divorce (where neither party was domiciled within the State) be made good by the appearance of the respondent. The express provision of the statute, declaring that such divorce shall be of no force or effect in this State, is not made for the benefit of a party which may be waived by an appearance or otherwise; but, it is made upon high considerations of general public policy and public interest, the provisions of which cannot be waived. Appearance is evidence only of consent, and express consent would be of no avail."

Upon the whole case, then, it is submitted:

1st. That the writ of error should be dismissed for want of jurisdiction; or

2d. The judgment should be affirmed because it is clearly right.

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